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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1969

CEFERINO PEREZ CARRIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. A petition for rehearing was denied on May 22, 1969. The petition for a writ of certiorari, filed on June 23, 1969, is out of time under Rules 22(2) and 34(1) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established the existence of a single conspiracy.

2. Whether petitioner was entitled to an instruction that the grand jury testimony of two government witnesses, which contradicted their trial testimony, could be considered as substantive evidence.

STATEMENT

A six-count indictment charged petitioner and six others with conspiracy to violate the federal counterfeiting laws (count one), and five completed substantive offenses in violation of 18 U.S.C. 472. Petitioner, named in the conspiracy count and in count six—possession of $304,000 in counterfeit currency on March 30, 1967—was convicted on both counts. On March 18, 1968, he was sentenced to three years' imprisonment on count one and to eight years' imprisonment, suspended in favor of five years' probation, on count six. The court of appeals affirmed (Pet. App. A).

The evidence showed that in late 1965 petitioner was the general manager of a Spanish language newspaper in New York City which was forced to close because of labor difficulties (Tr. 46).[1] After an attempt to publish a successor newspaper failed, petitioner, in February 1966, arranged with an employee, co-defendant German Castanera,[2] who was an expert in photographic offset printing, to form a printing

[1] The trial transcript ("Tr.") has been combined in two volumes, and filed with the Clerk of this Court.

[2] Castanera and co-defendants Sergio Castro and Tamara Pino pleaded guilty to the conspiracy and to various substantive counts in which they were named. All three testified for the government at petitioner's trial.

company, using equipment from the newspaper. Although petitioner promised to solicit business, he failed to secure any work for the company. Instead, petitioner and two other co-defendants, Jesus Gonzalez-Carta and Sergio Castro, planned to use Castanera's talents to counterfeit Dominican Republic pesos (Tr. 55–59, 437–438, 442–443). When Castanera was advised of the scheme by petitioner and Gonzalez-Carta, he said that he was interested; he was then told to determine what equipment he needed to do the counterfeiting (Tr. 61). Early in March 1966, Castanera told Gonzalez-Carta that he would need $500 for a printing press. Gonzalez-Carta then expressed doubts about petitioner's "reliability," and the next day he introduced Castanera to Castro. Castanera agreed with Castro and Gonzalez-Carta to go ahead with the counterfeiting of Dominican Republic pesos and to share the profits equally (Tr. 81). When Castanera sought to terminate his partnership with petitioner in the printing business, petitioner agreed and even asked Castanera to take the business equipment, worth about $1,500 (Tr. 85–87). Castanera installed this equipment in his basement, together with a printing press purchased with funds furnished by Gonzalez-Carta (Tr. 87, 93–94).

Because of technical difficulties, Castanera was unable to make an acceptable reproduction of the Dominican Republic peso (Tr. 89–90). Castro and Gonzalez-Carta then became dubious of Castanera's talents

[3] Gonzalez-Carta and co-defendant Alberto Cepero were tried jointly with petitioner.

and decided to test him by requesting that he counterfeit drivers' licenses and draft cards (Tr. 76–77, 445). Pleased with the results of that test, the two then decided to arrange for the counterfeiting of United States currency, which Castanera had said was easier to reproduce than the peso (Tr. 95, 451). Castro and Gonzalez-Carta discussed the proposed change in plans with petitioner, who agreed to provide financial assistance but cautioned them not to let Castanera know that he was involved (Tr. 455).

During the spring, summer, and fall of 1966, Castanera printed $840,000 in counterfeit 20-, 50-, and 100-dollar bills, and delivered the money to Castro and Gonzalez-Carta. They passed some of the bills and sold others at a fraction of their face value (Tr. 96–108, 457–487). In mid-December 1966, Castro presented petitioner with samples of the counterfeit bills and offered the currency to him at 10 percent of face value. Petitioner retained the samples (Tr. 495–496).

In the following month Gonzalez-Carta left the enterprise. Castro continued the business with Castanera briefly before they, too, decided to part company. They divided the remaining counterfeit currency evenly between them (Tr. 111–116, 498–504).

Castanera took his share to his house in Bergenfield, New Jersey, where petitioner visited him in January 1967. He told petitioner about the currency and said that he wanted to remove it from his house. Petitioner told Castanera that he had an apartment on 56th Street in Manhattan, where the money could be stored, and he also took some samples of the cur-

rency (Tr. 117–118). The next day petitioner took Castanera to the apartment, gave him the keys, and showed him a place in a closet to hide the money (Tr. 118–120). Petitioner said that he would "see what he could do" about disposing of the money (Tr. 120).

Castro was arrested on March 29, 1967. A few hours after the arrest, petitioner notified Castanera by telephone and cautioned him not to have any of the evidence at home (Tr. 121). Castanera was arrested that same evening, however, and a search of his premises by Secret Service agents uncovered one counterfeit bill and some plates. The next morning Castanera led the agents to the 56th Street apartment, where they retrieved counterfeiting equipment and notes with a face value of $304,000 (Tr. 423–430).

At the time of his arrest, Castro turned over to the Secret Service some of his share of the counterfeit currency, but he secretly retained an additional amount (Tr. 516). In early April 1967, he told petitioner that he still had some money left to sell. In May, petitioner requested $50,000 on credit. Castro refused to supply that amount, but agreed to give petitioner $20,000 immediately and the balance after he had paid 10 percent of the face value (Tr. 529). Petitioner took delivery of the money, but never paid Castro (Tr. 530). In June 1967, Castro was arrested for bank robbery, and at that time he surrendered the remainder of his share, about $85,000 in counterfeit currency (Tr. 531).

ARGUMENT

1. Contrary to petitioner's contention, the evidence fully supports the jury's conclusion that there was a unitary criminal enterprise and not multiple conspiracies.[4] The evidence showed that petitioner was involved in the scheme from its inception, having participated in the planning for counterfeiting pesos and in the initial proposal to Castanera concerning his ability to print currency of "any country" (Tr. 55–56). After his newspaper ventures failed, petitioner kept his association with only one employee, Castanera, whom he knew to be an expert in photographic offset printing. He ostensibly formed a printing business with Castanera, but he never fulfilled his obligation to obtain legitimate printing work for Castanera. When the printing shop was abandoned, with petitioner's concurrence, as Castanera became more deeply involved in the counterfeiting, petitioner prevailed upon Castanera to take the costly printing equipment and allowed it to be installed in the basement of Castanera's home. In the meantime, the details of the plan to print currency were being formulated by petitioner and other co-conspirators.

Thereafter, Castro and Gonzalez-Carta became the prime participants in the counterfeiting operation with Castanera, while petitioner moved to the sidelines. But

[4] The court instructed that proof of several independent conspiracies was not proof of the single conspiracy charged in the indictment, and that if the jury found that the government's evidence failed to establish one conspiracy, it had to acquit petitioner and the two co-defendants who were tried with him (Tr. 1388–1389).

when financial assistance was required for the change-over from pesos to dollars, the co-conspirators turned to petitioner. The absence of evidence of petitioner's direct involvement in the management of the enterprise was explained at trial as a consequence of his desire, expressed to Castro and Gonzalez-Carta, that his participation should be concealed from Castanera.

The conspiracy did not end with Castro's arrest in March, since he clearly intended to continue selling counterfeit money, which he resumed doing four days after his arrest. By this time Castro and Castanera had terminated the remaining counterfeiting operation. But petitioner maintained a link between them and continued his dealings with both of them concerning the marketing of the counterfeit. He never communicated a desire to withdraw. His own testimony, rejected by the jury, was simply that he was never aware of the counterfeiting conspiracy in the first place (Tr. 1064–1076).

In short, the evidence showed that petitioner was one of the parties to a large, common plan, "joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal." *Blumenthal* v. *United States*, 332 U.S. 539, 558. Although petitioner did not participate in all of the counterfeiting transactions, the evidence of these other acts was admissible to show the full extent and operation of the conspiracy. As the Second Circuit stated in *United States* v. *Dardi*, 330 F. 2d 316, 329 (C.A. 2), certiorari denied, 379 U.S. 845:

> * * * Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jigsaw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. * * *

See *United States* v. *Hickey*, 360 F. 2d 127, 140 (C.A. 7), certiorari denied, 385 U.S. 928. Even in the absence of a single-conspiracy charge, all of the transactions properly could have been joined in a single indictment or consolidated for a single trial. And the conduct of the trial here reduced to a minimum the danger from the admission of evidence not related to petitioner because the transactions involving others were inextricably intertwined with petitioner's complicity in the scheme. See *Berger* v. *United States*, 295 U.S. 78; *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2), certiorari denied, 372 U.S. 959.

2. In their testimony before the grand jury, both Castro and Castanera had made statements regarding petitioner's involvement in the counterfeiting scheme which they later contradicted at trial. Castro had told the grand jury that he never discussed counterfeit money with petitioner, while at trial he stated that petitioner had approved the plan, obtained samples of currency, and thereafter requested $50,000 in counterfeit notes and received nearly half that amount. Castanera had testified before the grand jury that Castro provided him with the 56th Street apartment to hide his money. At trial he said that petitioner provided the apartment, and explained that he had

not wanted to involve petitioner at the time of the grand jury hearing (Tr. 326). Following the court's closing instructions, petitioner made a belated request to charge that the grand jury testimony of government witnesses Castro and Castanera might be considered as affirmative evidence and not merely as prior inconsistent statements impeaching their trial testimony. The court considered the request but declined to give the instruction.

The district court's determination is consistent with the general rule that prior inconsistent statements of a witness are admissible only for the purpose of impeachment. See *Bridges* v. *Wixon*, 326 U.S. 135, 150–154. In *United States* v. *DeSisto*, 329 F. 2d 929 (C.A. 2), certiorari denied, 377 U.S. 979, the Second Circuit formulated a limited exception to this rule, holding that where a witness called to establish a fact denies knowledge of it, the proponent may show as affirmative evidence that the witness had testified to that fact at a previous trial involving the same issue or before the grand jury. In *United States* v. *Nuccio*, 373 F. 2d 168 (C.A. 2), certiorari denied, 387 U.S. 906, the same court distinguished *DeSisto* from a situation, like the present case, where the witness testifies to the existence of a particular fact and cross-examination establishes a prior contradiction. There, the court said the self-contradiction itself accomplishes the objective of destroying credibility without the further step of converting a government witness into a witness for the defense. The court indicated that it "would be loath to disturb a trial judge's refusal" to allow the prior testimony to serve as sub-

stantive evidence (373 F. 2d at 173). The panel which heard petitioner's appeal held that this issue was controlled by *Nuccio*, and declined to find error in the district court's ruling.[5] This decision is not in conflict with the holdings of the courts of appeal[6] and does not warrant further review.

Moreover, in this case the trial judge did not charge that the grand jury testimony of Castanera and Castro could be considered only for impeachment purposes. Thus, petitioner's jury had the option of fully crediting the prior testimony rather than the trial testimony of these witnesses. By its verdict, the jury evidently chose to believe the inculpatory trial testimony and reject the contradictions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] The panel below included Judge Friendly, the author of both the *DeSisto* and the *Nuccio* opinions.

[6] Other circuit courts have chosen not to follow *DeSisto*. *Byrd* v. *United States*, 342 F. 2d 939 (C.A.D.C.); *United States* v. *Crowder*, 346 F. 2d 1 (C.A. 6), certiorari denied, 382 U.S. 909; *United States* v. *Schwartz*, 390 F. 2d 1 (C.A. 3).

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